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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

NO. 751.

ROY T. MOBLEY, Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

In opposition to the petition for writ of certiorari filed by the petitioner herein, the respondent shows unto the Court:

A.

STATEMENT OF FACTS.

For the purposes of this brief, the respondent adopts the statement of facts contained in the opinion delivered by the Circuit Court of Appeals for the Fifth Circuit, **Mobley vs. New York Life Ins. Company, 74 F. (2) 588,** wherein the following language is used:

> "This appeal complains mainly of the instruction by the Court of a verdict for the defendant in the trial of consolidated suits brought by Roy T. Mobley against the New York Life Insurance Company upon two similar policies of life insurance carrying benefits in case of total disability.

By the terms of the policies, premiums necessary to maintain the insurance were due semi-annually, but on proof of total disability before the age of sixty, subsequent premiums were to be waived and monthly benefits paid so long as the disability lasted. Proof of continuance of the disability might be demanded not oftener than once a year, and on failure to furnish such proof, no future disability payments would be made nor further premiums waived; but in case of default in payment of premiums after total disability, the policy might be restored and all benefits paid as if no default had occurred, provided that not more than six months after the default due proof were made of a continuous total disability since the default that would continue for life, or that had continued for three consecutive months. Mobley, at the age of thirty-three, while his policies were in force, had an operation for appendicitis with results that totally disabled him, and he collected disability benefits for two years through January, 1933. The Insurance Company, on March 1, 1933, wrote to him: 'It appears that for some time past you have not been continuously totally disabled within the meaning of the disability benefit provision contained in the policies. In view of this condition, we regret to inform you that no further disability payments will be made, and the premiums due on and after February 7, 1933, become payable in conformity with the terms of the contracts.' Mobley in reply said he was taking im-

mediate legal steps to secure the benefits under the policies. On March 9th, the Company wrote that the matter was receiving further attention, and the same day an attorney employed by Mobley wrote the Company demanding payment of $28,980.00 as for a total breach of the insurance contracts and threatening suit. On March 17th, the Company wrote the attorney that its medical examiner in January had reported Mobley able to do light work of a remunerative nature, and that he could no longer be considered totally disabled within the definition of the policies, and that payment of benefits had been discontinued, to which decision it would adhere. On April 13th, the Company wrote Mobley that one of the policies had lapsed for nonpayment of premium, and urged him to apply for reinstatement to protect his interests. On June 5th, it advised him: 'Application for reinstatement after default in premium, specified above not having been made, notice is hereby given that pursuant to the terms of the policy, the value of the policy has been applied to purchase continued insurance' until June 20, 1937. On June 9th, the Company gave notice of the premium falling due July 9th on the other policy. On July 8th, Mobley's attorney had written that Mobley did not agree to the action stated in the letter of June 5th, and would sue in a few days. In answer, the Company wrote that it was willing to give Mobley's claim for disability benefits further consideration, and asked for a statement from his phy-

sician as to his condition since January, and stated that one of its physicians would also call on Mobley to examine him. The examination was made July 24th, and chronic heart disease was found. The Company claimed that this was its first knowledge of the heart trouble. It concluded he was totally disabled and tendered him on August 9th $910.00 accrued benefits, and a written waiver of premiums; but, on July 24th, suit on one policy had been filed, and a few weeks later suit was filed on the other. The Company pleaded the foregoing facts and correspondence, and continued the tender with accrued costs. The suits claim a recovery of damages measured by the sum of the disability payments for the life expectancy of Mobley plus the amount that would be due at his death, all reduced to preesnt value, upon the theory of an anticipatory breach of the contracts. The Judge directed that the plea of tender be sustained."

B.

ARGUMENT.

POINT I.

The decision of the Supreme Court of Mississippi should be highly persuasive.

We are well aware of the rule that in questions of important commercial law Federal courts are not necessarily bound by state court decisions upon common law questions. This rule does not justify the conclusion, however, that state decisions should be thoroughly disregarded. Upon

the other hand, the policies were delivered and the premiums paid in Mississippi. The policies were Mississippi contracts. **New York Life Insurance Co. v. Dodge**, 38 S. Ct. 337, 246 U. S. 357, 62 L. Ed. 772.

And, therefore, necessarily great regard should be had for the state law upon the subject even if common law principles are applicable. It is only where the state rule as announced is contrary to well-established principles of common law prevailing in the Federal courts that such courts would be justified in disregarding the state rule.

In the case of **Trainor v. Aetna Casualty & Surety Co.**, 290 U. S. 47, 78 L. Ed. 162, this Court used the following language, which is highly applicable to the present case:

> "The circuit court of appeals held that the Pennsylvania decisions merely declared the common law of that state with regard to suretyship, and since the law is derived from the principles of general jurisprudence common to all the states, a federal court, in determining what it is, might exercise an independent judgment. We do not deem it necessary to discuss the principle enunciated or to decide whether the Pennsylvania decisions come within it. It is enough to say that even where the principle applies, 'for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt.' Burgess v. Seligman, 107 U. S. 20, 33, 34, 27 L. Ed. 359, 365, 2 Sup. Ct. 10. And see Sim vs. Edenborn, 242 U. S. 131, 135, 61 L. Ed 199, 203,

37 S. Ct. 36, where the authorities are collected; Community Building Co. vs. Maryland Casualty Co., (C. C. A. 9), 8 Fed. (2) 678, 680. In the present case, it would not be going far enough to say merely that the question is 'balanced with doubt,' for it seems to us that the Pennsylvania decisions and those of the other states cited above, are plainly right. Compare Messenger vs. Anderson, 225 U. S. 436, 444, 56 L. Ed. 1152, 1156, 32 S. Ct. 739."

In the recent case of **Mutual Life Ins. Co. of New York v. Johnson,** Adv. Opinions, October term, 1934, decided by this Court December 3, 1934, Judge Cardozo used the following language:

"In this situation, we are not under a duty to make a choice for ourselves between alternative construction as if the courts of the place of the contract were silent or uncertain. Without suggesting an independent preference, either one way or the other, we yield to the judges of Virginia expounding a Virginia policy and adjudging its effects. The case will not be complicated by a consideration of our power to pursue some other course. The summum jus of power, whatever it may be, will be subordinated at times to a benign and prudent comity. At least, in cases of uncertainty we steer away from a collision between courts of state and nation when harmony can be attained without the sacrifice of ends of national importance. No question as to a rule of the law

merchant is present in this case. Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865. No question is here as to any general principle of the law of contracts of insurance, (Carpenter v. Providence Washington Ins. Co., 16 Pet. 495, 511, 10 L. Ed. 1044, 1051; Aetna Life Ins. Co. v. Moore 231 U. S. 543, 559, 58 L. Ed. 356, 366, 34 S. Ct. 186), with consequences broader than those involved in the construction of a highly specialized condition. All that is here for our decision is the meaning, the tacit implications of a particular set of words, which, as experience has shown, may yield a different answer to this reader and to that one. With choice so 'balanced with doubt,' we accept as our guide the law declared by the state where the contract had its beginning. Trainor v. Aetna Casualty & Surety Co., 290 U. S. 47, 54, 78 L. Ed. 162, 165, 166, 54 S. Ct. 1; Sim v. Edenborn, 242 U. S. 131, 135, 61 L. Ed. 199, 203, 37 S. Ct. 36; Community Bldg. Co. v. Maryland Cas. Co. (C. C. A. 9), 8 Fed. (2) 678, 680; Fordson Coal Co. v. Kentucky River Coal Corp., (C. C. A. 6), 69 Fed. (2) 131, 132."

The rule should be very easily applied in the present case, for that the Mississippi law is in accord with the respondent's theory of the case, and, as we shall hereafter point out, in accord with the great weight of authority, both state and federal.

The Supreme Court of Mississippi, in the case of Metropolitan Ins. Co. v. Lambert, 128 So. 750, 157 Miss. 759, held that under a $2000.00 life policy, providing for

monthly payments for total disability, the insured, totally disabled, could recover only unpaid monthly installments. In that case, the insured, while employed by the Mississippi Central Railroad Company, suffered a fracture of the wrist, of a serious character. The wound healed, but he was unable to use his hand thereafter. The insurance company denied liability under the total and permanent disability clause of the policy, and alleged that the insured's disability was partial and not total. In bringing his suit, the insured asked for not only the installments that were then due him by the insurance company, but also for all future installments under his policy. The jury returned a verdict for the insured without designating the amount of his recovery, and the court entered a judgment thereon for $2000.00. The Supreme Court of Mississippi reversed this holding of the lower court, and used the following language:

> "The appellee's policy was for two thousand dollars, but payable, in the event of his becoming totally disabled, in forty monthly installments of $52.50 each. The jury returned a verdict for the appellee, without designating the amount of his recovery, and the court entered a judgment thereon for two thousand dollars. This was error. The declaration alleges the failure of the appellant to pay any of the monthly installments accrued under the policy; and while it prays for a recovery in the sum of two thousand dollars, the only recovery to which appellee was entitled was for the unpaid monthly installments of $52.50 each; and a judgment should have been entered for the aggregate thereof, with accrued interest, only.

"For this error, the judgment of the court will be set aside, and a proper judgment will be entered here."

The rule was re-examined and affirmed by the Supreme Court of Mississippi in the case of **Atlantic Life Co. v. Serio**, 157 So. 474.

POINT II.

The decision of the Circuit Court of Appeals not in conflict with prior decisions of this Court.

The doctrine of anticipatory breach from time immemorial has been one of limited operation. A complete investigation of the common law as far back as **Rochester v. De La Tour**, 2 El. Bl. 678, shows that one party to a contract will be allowed to sue for complete damages for a breach of a contract before such breach occurs only in three cases, to-wit: Contracts to manufacture and sell goods; Contracts of marriage; and Contracts for personal services.

The case of **Rhoem v. Horst**, 178 U. S. 1, 44 L. Ed. 953, was a breach of an executory contract for the sale of merchandise. The contract was executory, and the buyer gave notice to the seller that no further acceptance of shipments under the contracts would be received. The Court held that suit might be brought for an anticipatory breach of the contract, using the following language:

"And the doctrine that there may be an anticipatory breach of an executory contract by an absolute refusal to perform has become the settled law of England as applied to contracts for services,

for marriage, and for the manufacture or sale of goods. The cases are extensively commented on in the notes to Cutter v. Powell, 2 Smith, Lead. Cas. 1212, 1220, 9th ed., by Richard Henn Collings and Arbuthnot. Some of these, though quite familiar, may well be referred to."

The Court permitted recovery, holding that there was no material distinction between a renunciation of the obligation of a contract already in the course of performance and a complete renunciation before the arrival of the time for performance. But the court took care to make it clear that the doctrine of anticipatory breach would only be applied to contracts containing mutually executory obligations, and would not be applied to a money contract such as a bond or note, because in those cases one party had fully performed his obligations. The court, speaking through Mr. Chief Justice Fuller, quoting a decision of Mr. Chief Justice Toney, in the case of Greenway v. Gaither, Federal Cases No. 5788, said:

"It has never been supposed that notice to the holder of a bond, or a promissory note, or bill of exchange, that the party would not (from any cause) comply with the contract, would give to the holder an immediate cause of action upon which he might sue before the time of payment arrived. In the case of an ordinary money contract, such as a promissory note, or a bond, the consideration has passed; there are no mutual obligations; and cases of that sort do not fall within the reason of the rule."

Liability for an anticipatory breach rests upon the philosophy that since the contract at the time of the repudiation thereof was executory upon each side, the injured party would have no right of action of enforcing the original agreement, or suing thereupon, because the time for performance had not arrived. Therefore, as an exception to the general rule, in order to prevent the injured party from being totally deprived of a present remedy, the doctrine of anticipatory breach as a matter of necessity presented itself. As before stated, however, the doctrine from time immemorial was of limited application, relating solely to controversies of a special nature, such as above set out. An effort to extend the doctrine, as in the instant case, to the payment of fixed sums of money due at stated intervals is a departure from the original principles upon which the action was founded. Notwithstanding that, however, as will appear from the authorities hereinafter cited, as a condition precedent to the right of action, the contract must have been executory upon both sides, (though it might be partially completed by one of the parties), accompanied by a refusal of the opposite party to perform the contract before default. In this case, we have neither of the requisite conditions:

(a) The petitioner's declaration in each case, as well as the undisputed proof, shows that the contract was completely performed so far as the petitioner was concerned. The petitioner alleges that due and proper proof of his total and permanent disability had been given to the respondent. Assuming that to be true, it became the duty of the respondent to make the monthly payments. The petitioner, however, was required to do nothing further.

The petitioner might instantly have sued for monthly disability payments. The lack of such right is what gives rise to the doctrine of anticipatory breach.

(b) Neither was the second requisite present. The respondent, at no time, repudiated its contract with the petitioner; it always admitted that the petitioner was the holder of two outstanding policies of life insurance, both of which were perfectly valid. It was respondent's claim, not that the contracts of insurance were invalid, but that the occasion had not arisen when the petitioner had the right to require the payment of monthly disability claims, in that he was not in a condition of total and permanent disability. Going a step further, the petitioner having submitted proof of continued total disability, the time for performance on the part of the respondent had arisen, and petitioner might sue upon the contract, so the principles of anticipatory breach did not apply.

The case of **Lovell v. St. Louis Mut. Life Ins. Co.**, 111 U. S. 264, 28 L. Ed. 423, bears no relation whatever to this case. There, the company agreed with the assured that after three full annual premiums were paid, if default should be made in the payment of a premium, a paid up policy would be issued to him for the amount of insurance which the premium would purchase. After paying three full premiums, the assured surrendered the policy to the company, with the request that such a policy should be issued to him. The company took the policy and kept it. In the mean time, it sold out to an entirely different company, which returned the policy to the assured with the endorsement that the policy was in force for a stipulated amount, provided interest on the assured's notes was paid.

The court held that this was a breach of the contract, and that the plaintiff might recover of and from the reinsuring company whatever he was entitled to under said contract with the original comapny. The assured was never at any time at fault in the performance of his obligation.

In the case of Pearce v. Tenn. R. R. Co., 173 U. S. 1, 43 L. Ed. 591, the plaintiff—appellant—was injured while in the employ of the appellee railroad company, and, in settlement of his claim for injuries, the railroad company agreed to employ him for the remainder of his life at a stipulated wage. This agreement was carried out by the railroad company for several years. Thereafter, the railroad company completely repudiated all liability to the plaintiff, and the plaintiff brought suit against the company for all damages sustained, or to be sustained, treating the contract as terminated. The contract was executory upon both sides, and being so executory, the railroad company having repudiated the entire contract, this court held that the plaintiff should be permitted to recover, using the following language:

> "If these facts were proved to the satisfaction of the jury, the case would stand thus: The defendant committed an absolute breach of the contract at a time when the plaintiff was entitled to require performance. The plaintiff was not bound to wait to see if the defendant would change its decision, and take him back into its service; or to resort to successive actions for damages from time to time; or to leave the whole of his damages to be recovered by his personal representative after his

death. But he had the right to elect to treat the contract as absolutely and finally broken by the defendant; to maintain this action, once for all, as for a total breach of the entire contract; and to recover all that he would have received in the future, as well as in the past, if the contract had been kept. In so doing, he would simply recover the value of the contract to him at the time of the breach of the contract."

In that case, there were mutual obligatory covenants, that of the plaintiff to perform services for the defendant throughout his natural life; that of the defendant to give the plaintiff employment and pay the agreed compensation. There, while the contract was still executory,—executory on the part of the plaintiff, in that it was the duty of the plaintiff to continue to serve the defendant throughout his life time,—executory on the part of the defendant, in that it was the duty of defendant to give to the plaintiff employment throughout his life time and compensate him therefor,—the defendant repudiated the binding effect of the entire contract upon it, and discharged the plaintiff from its employ and ejected him from its premises.

Assuming that the doctrine of anticipatory breach has any application whatsoever to a contract providing for the payment of monthly disability payments conditioned upon the physical total and permanent disability of the assured, in the instant case, the petitioner, according to the allegations of his own declaration and the undisputed proof, had completely executed the contract so far as he was concerned.

The case of Kelly v. Security Mutual Life Ins. Co., 78 N. E. 584, 186 N. Y. 16, was quoted with approval in the case of Killian v. Met. Life Ins. Co., 251 N. Y. 44. In that case, the court needed to define the word "contest" under a provision of the policy that the policy was incontestable after two years. The defendant company had denied liability within two years, but had taken no steps in regard to contesting the same, and no suit had been brought thereon. In the opinion, written by Judge Cardozo, the court said:

> "Repudiation of a policy is notice that a contest will ensue, if insured or beneficiary shall make attempt thereafter to enforce a claim of right. It is not a contest of itself. Repudiation before maturity (the subject of the contract being a policy of insurance) is not even such a breach as will sustain a remedy at law for the recovery of damages, (Kelly v. Secur. Mut. Life Ins. Co., 186 N. Y. 16), though it may be the occasion for a declaratory judgment or other remedy in equity."

The foregoing rule is very applicable to the present case. The petitioner would have the right, on the equity side of the federal court, to require specific performance upon the part of the insurer, and would doubtless be entitled to obtain a declaratory judgment in connection therewith, making it the duty of the insurer to waive the payment of premiums and pay monthly disability claims during the period of the disability, which would afford to the assured an adequate remedy, and complete protection.

POINT III.

(a) The opinion of the Circuit Court of Appeals in the instant case does not conflict with the decision of the Court of Appeals of any other Circuit.

Federal Life Ins. Co. v. Rascoe, (C. C. A. 6), 12 Fed. (2), 693. The plaintiff there held an accident policy which agreed to pay him the sum of $25.00 per week during the continuance of total disability caused by accidental injuries sustained while a passenger on a common carrier. The plaintiff submitted proofs of such accident and disability, and the defendant made a number of payments, and then refused to make further payments. The plaintiff sued, not only for installments alleged to have accrued, but also for the value of future installments. It appeared, however, that the policy required the plaintiff to furnish defendant, insurance company, medical reports every thirty days, showing his or her condition, and the continued existence of the disability. It does not appear that this was an obligation only to be performed on request, but a positive duty incumbent upon the plaintiff every thirty days. The majority opinion makes express reference to the fact that it was shown by the petition that plaintiff had furnished the defendant, regularly, every thirty days, a report of her attending physician, showing her condition, and that, by reason of such fact, the contract was not wholly performed on her part, but was still executory. The cause was submitted to the court without a jury; no finding of fact or conclusions of law were asked or made, and, as a result, the record is in a very unsatisfactory state. The court permitted recovery, not only of past due installments, but of a sum which included either prospective fu-

ture installments or their present value. The court said that since there was no separate finding of fact, the appellate court had no authority to review the evidence or questions of law presented. The court said, furthermore, that except for plaintiff's disabling injuries, she was in good health, and was likely to live out her expectancy. The court invoked the rule by holding that the requirement of periodic proofs made the contract executory. In rendering the opinion, the court explained its holding in the following language:

> "In this case, the plaintiff does not rely upon the anticipatory breach, nor upon mere delay, neglect or default to pay the several installments due under the terms of this contract, but upon an actual breach, after full proofs of continuing disability had been made in the manner and form specially provided in the policy, coupled with an actual repudiation of the entire contract. A jury was waived, and the trial court found on the issues joined for the plaintiff. Tri-Bullion Smelting Co. v. Jacobson, 233 Fed. 646, 147 C. C. A. 454. There are no separate findings of fact, and this court has no authority to review the evidence or question of law presented by it. Law v. U. S., supra. But, even if this court could accept the opinion of the trial court, in connection with the motion for a new trial, as a separate finding of fact, it appears therefrom that the courts specially found that defendant was acting in bad faith; that it was guilty of an actual breach and an unequivocal repudiation of the entire contract."

In the above mentioned case, there was a strong dissent on the part of Judge Denison, and an ably written dissenting opinion, to which we call the Court's attention:

> "The parties made a contract by which, in the event of the plaintiff's injury, defendant was to perform at future periods. The judgment, upon the theory of anticipatory breach, has transformed it into a contract for present performance. Unless there is clear and satisfactory reason, according to settled legal principles, the defendant should not be held liable for not doing something which it never agreed to do, and this is as true in regard to time of performance as to other particulars. A plaintiff who wants now a payment which he agreed to wait for until next year, should show a clear right, not a doubtful one.
>
> "Roehm v. Horst is the leading case in the United States. It declares that, where a contract executory on both sides is repudiated by one party, the other may presently have his damages assessed as for an anticipatory breach; but it excepts from that rule cases where the contract on the plaintiff's part is not executory. The exception can not be interrupted and applied without understanding the reason for it, and search for the reason for the exception must take us to the reason for the rule. This is not satisfactorily developed, as I think, in any judicial text-book discussion which I have seen. The suggestion that there is an implied contract to keep the express contract in force, and that damages of this character are

really assessed for breach of this implied contract, seems to me to be going a long way for an answer. To my mind, the most forceable reason for the rule of anticipatory damages is this: In the ordinary case of mutually dependent executory contracts, the plaintiff may say to defendant: 'True, I have no right to claim damages now for your non-performance of what you agreed to do next year; but the meritorious reason for my inability is that you are not obliged to perform your part of next year's contract, unless I also perform my part. Now, by your repudiation, you have put it out of my power further to perform, and hence you can not be permitted to say that you have not received or will not receive that consideration for your future act, and there is no good reason why you should not pay now (less discount) the damages which would accrue next year.'

"If this be the reason for the rule, it explains as well the exception. Where his part of the contract has been executed by the plaintiff, he has nothing to do but wait, and to do so continues to be in his power. His position will not be prejudicially changed by defendant's repudiation; and hence he will have no estoppel to rely upon to precipitate the defendant's obligation. It follows that, not only by its authority, but upon sound principles, the exception made in Roehm v. Horst should be recognized and applied, and not dissipated by hesitant application.

"I do not understand that a contract sued up-

on is executory, as against a plaintiff, unless it binds him to do something, so that an action may lie against him for specific performance, or for nonperformance. By that definition, the contract here sued upon is not executory upon the plaintiff's part. She is merely obliged, from time to time, to furnish evidence, if and when she wishes payment; what she must do is, in kind, like presenting a note for payment at a particular place, although it is more burdensome in degree; after all, it is a condition, not an obligation.

"Further, I do not find in the facts such an absolute repudiation of the contract as justifies the application of the anticipatory breach rule."

We direct the attention of the Court to the fact that the Supreme Court of the State of Mississippi, in **Atlantic Life Ins. Co. v. Serio**, 157 So. 474, adopted as the law in the State of Mississippi the rule announced in the dissenting opinion of Judge Denison. Therefore, we respectfully submit that the case of **Federal Life Ins. Co. v. Rascoe**, 12 Fed. (2), 693, is not in conflict with the decision of the Circuit Court of Appeals in the instant case, for that:

(a) The case was tried in the district court without a jury. There was no finding of fact upon the part of the district judge who heard the case, and the opinion of the Circuit Court of Appeals, Sixth Circuit, expressly held that it was without authority to review the decision. Therefore, the opinion of two members of the court in respect to the rule applicable thereto was obiter dictum, and should not be considered and treated as a judicial opinion upon the question involved.

(b) A majority of the members of the Circuit Court of Appeals for the Sixth Circuit in that case held that, in view of the fact that the plaintiff was required, without any request of the defendant, to appear once a month for examination, the contract was executory, and being so executory, the defendant in its answer had repudiated the entire contract.

(c) In view of the very strong dissenting opinion of Judge Denison, and that, as will appear from the opinion of the Circuit Court of Appeals of the Fifth Circuit in the instant case, the majority opinion has met with such universal disapproval; and, in view of the fact that the dissenting opinion of Judge Denison has met with such universal approval, this court should not treat the majority opinion as a judicial precedent contrary to the opinion of the Circuit Court of Appeals, Fifth Circuit, in the instant case.

In respect to the Rascoe case, the Circuit Court of Appeals, Fifth Circuit, in this case, used the following language:

> "In Federal Life Ins. Co. v. Rascoe, 12 Fed. (2) 693, the doctrine was applied by a divided court to render collectible at once both past and future disability payments as here contended for, and Mobley relies strongly on that case. It has been more conspicuously distinguished and disapproved than followed. In federal courts, see Kithcart v. Met. Life Ins. Co., 1 Fed. Sup. 719; Wyll v. Pacific Mutual Life Ins. Co., 3 Fed. Sup. 483; Mennsen v. Travelers Ins. Co., 5 Fed. Sup. 114;

Ginsburg v. Pacific Mut. Life Ins. Co., 5 Fed. Sup. 296; Hines v. Fed. Mut. Life Ins. Co., 6 Fed. Sup. 692. It seems opposed in principle to the decision in the Eighth Circuit in Moore v. Security Trust & Life Ins. Co., 168 Fed. 496, where, in effect, it is held that while an executory contract of life insurance is capable of anticipatory breach, no contract to pay money is after it has become executed on the part of the promise. In the State of Tennessee, where Rascoe's policy was made and to be performed, the Supreme Court, three years later, held that, on a wrongful suspension of a certificate holder, only his annuity benefits in default, and not future installments, could be recovered. Atkinson v. R. R. Employees Mutual Relief Society, 22 S. W. (2) 631. In Mississippi, under the laws of which state the present policy was issued, Rascoe's case has been expressly disapproved. Atlantic Life Ins. Co. v. Serio, 157 So. 474. That only accrued disability installments could be recovered had been previously held in Metropolitan Life Ins. Co. v. Lambert, 157 Miss. 759, 128 So. 750. Similar holdings on installment insurance benefits have been made in other states, as Woods v. Provident Life & Accident Ins. Co., 42 S. W. (2) 499; and Howard v. Benefit Association of Railway employees, 39 S. W. (2) 657, in Kentucky. In Garbush v. Order of United Commercial Travelers, 228 N. W. 148, the Supreme Court of Minnesota refused to follow Rascoe's case. The Supreme Court of Missouri in Puckett v.

National Annuity Association,—Mo....., 114 S. W. 1039, held that only benefits past due could be recovered, and its Court of Appeals, disapproving the Rascoe case, recently held the same way in Allen v. National Life & Accident Ins. Co., 67 S. W. (2) 534; and Chipley v. National Life & Accident Ins. Co., 67 S. W. (2) 992. The courts of Texas also refuse recovery for installments of insurance not due. New York Life Ins. Co. v. English, 96 Tex. 268; State Life Ins. Co. v. Atkins, 9 S. W. (2) 290."

It will be interesting to observe that in the cases cited, and the list by no means includes all of them, not only is the majority opinion in the Rascoe case disapproved, but the dissenting opinion of Judge Denison actually approved and adopted.

(b) The decision not in conflict with decisions of the Circuit Court of Appeals for the Eighth Circuit.

Mutual Reserve Fund Life Assurance Association v. Fereenbach, (C. C. A. 8), 144 Fed. 342. In that case, the insurer, during the life time of the assured, claimed that the assured's policy was forfeited for nonpayment of premiums, and refused to accept further premiums tendered thereafter. Upon the death of the assured, the plaintiff claimed the full face of the policy plus all premiums paid, and judgment was entered for the assured in the district court for such amount. The Circuit Court of Appeals for the Eighth Circuit, however, held that the plaintiff was entitled to recover the face of the policy less the cost of carrying the same to the maturity thereof. It readily ap-

pears, therefore, that the case sustains no relation to the present case.

Colorado Yule Marble Co. v. Collins, 230 Fed. 78, (C. C. A. 8). In that case, the appellant employed the appellee to do certain construction work for it. After the appellee had proceeded with the performance of the contract, the appellant requested that the work be stopped and refused to permit the appellee to proceed therewith. The appellee sued for accrued estimates on the work as well as the profits which he would have made. The Circuit Court of Appeals justified the recovery, using the following language:

> "As bearing upon the first three of these points, it should be borne in mind that this was a partially executed contract, and a number of the authorities agree that there is a difference between contracts wholly executory and those executed in whole or in part. But in Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, the Supreme Court, after a most exhaustive consideration of both English and American authorities, held substantially that there was no difference between purely executory and partly executed contracts, and that where one party to a contract clearly and positively announced his contract before any part of it was executed, a cause of action for the loss of profit accrued at once to the other party. That opinion is quite conclusive, so far as it goes, upon this court, as it was upon the District Court."

It will readily appear that there is no conflict between that case and the instant case. There, while the contract

was executory upon both sides, one of the parties prevented further performance on the part of the plaintiff, and the court held that the plaintiff should recover for an anticipatory breach.

The opinion of the Circuit Court of Appeals in the instant case does not conflict with the case of United Press Ass'n v. National Newspapers Ass'n, (C. C. A. 8), 254 Fed. 284. The facts in that case are stated in 237 Fed. 547, from which it will appear that the plaintiff contracted to sell to the defendant, a newspaper publisher, a certain news service for a term of years, to be paid for weekly in advance. While the contract was executory on both sides, the defendant repudiated the same.

(c) The decision of the Circuit Court of Appeals is not in conflict with the decisions of the Ninth Circuit.

The decision of the Circuit Court of Appeals in the instant case does not conflict with the case of Aetna Life Ins. Co. v. Geher, (C. C. A. 9), 50 Fed. (2) 657. In that case, the agent of the appellant insurance company delivered a policy to the assured, which provided that it should not become effective except and unless the first premium was paid. The Insurance Company contended that the policy was delivered to the assured merely for inspection. Concurrently therewith, however, the assured met death, entitling the beneficiary to the benefit of the double indemnity of the policy, provided the policy was in force. The company denied all liability under the policy, claiming the benefit of the provisions therein contained to the effect that the policy was not to become effective except and unless the first annual premium was paid in cash. Under the Civil Code of California, however, (see page 658), the

delivery of the policy made the same effective. The court held that recovery might be had upon the policies without making proof of death, and without waiting to the end of what is known as the endowment term. In other words, that the beneficiary was entitled to sue immediately. In that case, it will be noted, however, that there are the following differences:

(a) The California statute invalidated the Clause in the policy that the policy should not become effective.

(b) The defendant insurance company fully and completely repudiated, in the most absolute terms, the obligation:

(c) It will be further noted that the assured was dead, and the beneficiaries were permitted to recover the benefits under the policy without waiting until the maturity thereof; that is to say, the expiration of the term time period.

(d) The decision of the Circuit Court of Appeals, Fifth Circuit, does not conflict with the decisions of the Tenth Circuit.

Prudential Ins. Co. of America v. Faulkner, (C. C. A. 10), 68 Fed. (2) 676, was a case where, under a disability policy, defendant had at its option either one of two methods of paying,—paying by the month or paying in a lump sum. When it repudiated the contract and refused to pay according to either method, and its liability being settled, the court held that it had waived its right to elect its method of settlement. The court used the following language:

> "It has been held that recovery can not be had for future installments, Borinson v. Exempt

Fire Co., 103 Cal. 1, 36 Pac. 955, 24 L. R. A. 715, 42 Am. St. Rep. 93; Mid-Continent Life Ins. Co. v. Walker, 128 Okl. 75, 260 Pac. 1109; Atkinson v. R. R. Employees Mut. Rel. Society, 160 Tenn. 158, 22 S. W. (2) 631. But in those cases and others to the same effect, only one method of payment was provided. No question of the right of a party to exercise the privilege of election between two methods of payment after breach of the contract was involved or decided. And recovery in advance of the due date likewise has been denied unless the contract be executory on both sides; that is, requiring future performance of interdependent obligations. Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953; Moore v. Security Trust & Life Ins. Co. (C. C. A. 8), 168 Fed. 496; Parks v. Maryland Cas. Co., (D. C.) 59 Fed. (2) 736; Kithcart v. Metropolitan Life Ins. Co. (D. C.) 1 Fed. Supp. 719; Wyll v. Pacific Mut. Life Ins. Co., (D. C.) 3 Fed. Supp. 483. But that question is not involved or decided here. We do not hold that plaintiff is entitled to recover for future installments, or in damages measured by their present value. Our conclusion is that its failure to pay the insured within time and in the manner specified in either method, by allowing such time to pass long since, thereby breaching the contract, defendant surrendered its right to select between the two methods."

(c) The opinion of the Circuit Court of Appeals was not in conflict with the general law on the subject.

The following opinions from state courts directly support the decision of the Circuit Court of Appeals for the Fifth Circuit in the instant case:

ARKANSAS: Mutual Life Ins. Co. v. March, 56 S. W. (2) 433; Mass. Protective Ass'n v. Jurney, 68 S. W. (2) 455.

KENTUCKY: Woods v. Provident Life and Accident Ins. Co., 42 S. W. (2), 499; Howard v. Benefit Ass'n, 39 S. W. (2) 657.

MINNESOTA: In the case of Garbush v. Order of Commercial Travelers of America, 228 N. W. 148, the Supreme Court of Minnesota expressly refused to follow the decision of the majority of the court in the case of Federal Life Ins. Co. v. Rascoe, supra, but chose to follow the well-reasoned dissenting opinion of Judge Denison. The court, speaking through Mr. Justice Hilton, said:

> "Defendant cited Federal Life Ins. Co. v. Rascoe, (C. C. A.), 12 Fed. (2) 693, in support of its contention that suit covering the $1300.00 could have been brought at once after disallowance of claim. The majority opinion in that case supports defendant's position. We, however, do not agree. Our view is in accord with a strong dissenting opinion of Judge Denison, in so far as the same is applicable to the present case. Here, there is an executory contract where there is nothing for plaintiff to perform."

MISSOURI: Puckett v. National Annuity Ass'n, 114 S. W. 1039.

NEW YORK: In the case of **Kelly v. Security Mutual Ins. Co.**, (Court of Appeals of New York), 78 N. E. 584, the court refused to establish the rule that the anticipatory breach of an insurance contract rendered the insurance company personally liable for damages to the insured, although the date of payment was not then due, and said:

> "An attempt to repudiate such a contract does not make it due. If the maker of a promissory note, given for borrowed money, and due one year after date, notifies the holder the next day that he repudiates it and will not pay it, can the holder sue at once? Can a mortgagor make his mortgage due before the law day by repudiating it in advance? The rule that renunciation of a continuous executory contract by one party before the day of performance gives the other party the right to sue at once for damages, is usually applied only to contracts of special character, even in the jurisdiction where it obtains at all. It is not generally applied to contracts for the payment of money at a future time, and in some states the principle is not recognized in any way whatever. Daniels v. Newton, 114 Mass. 530, 19 Am. Rep. 384; Stanford v. McDill, 6 N. D. 536, 72 N. W. 938, 38 L. R. A. 760; Carstens v. McDonald, 38 Neb. 838, 57 N. W. 757; King v. Waterman, 55 Neb. 324, 75 N. W. 830. In other states and in the Federal courts, the principle is adopted but applied with caution. Roehm v. Horst, 178 U. S. 1, 17, 18, 20 S. Ct. 780, 44 L. Ed. 953; Schmidt v. Schnell, 7 O. Dec. 657; Brown v. Odill, 104 Tenn.

250, 56 S. W. 840, 52 L. R. A. 660; Reedling's Sons v. Fence Co., 130 Ill. 660, 22 N. E. 518; Unexcelled Fire Works Co. v. Polites, 130 Pa. 536, 18 Atl. 1058, 17 Am. St. Rep. 788. In this state, it seems to be limited to contracts to marry, (Burtis v. Thompson, 42 N. Y. 236, 1 Am. Rep. 516;) for personal services (Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285) and for the manufacture or sale of goods (Windmuller v. Pope, 107 N. Y. 674, 14 N. E. 436; Nichols v. Scranton Steel Co., 137 N. Y. 471, 33 N. E. 561). At least we have not extended it to mutual life insurance policies, perhaps for the reason that the question of fact opened to unscrupulous persons by such extension might undermine the solvency of the company and inflict gross injustice upon the other policyholders."

In **Forlen v. Fidelity & Casualty Co.**, 192 N. Y. Sup., 513, the insured was disabled by insanity. Suit was brought for the commuted value of all installments based upon the life expectancy of the insured. The court held that the policy itself provided when, and how, and under what circumstances, payments would be made, and the provisions in this case were that it was evidently the intention of the parties to pay only at the stated time, and plaintiff could recover nothing in addition thereto. The court suggested, furthermore, that there was no such refusal or denial of liability as would in any event furnish grounds for damages. The court used the following language:

"The proof shows that she is suffering from an incurable malady, and based upon the assumption that the incompetent would never fully re-

cover, this action was brought to recover an amount to be based upon the expectance of life of the incompetent, as shown by the Northhampton Tables, the defendant having first disclaimed all liability under the policy. Plaintiff can not, however, succeed on this branch of the case. The policy states definitely when and under what circumstances the defendant is required to pay, and its refusal to pay the full amount of the weekly indemnity specified in the policy, based upon its belief that the plaintiff is not entitled to the maximum of such weekly benefits, is not such a refusal to pay or such a denial of its liability as would in any event furnish grounds for an action to recover the full amount of the loss at this time. But, aside from that reason, the policy states definitely when and under what circumstances the weekly indemnity is to be paid, and the plaintiff can not recover in this action the full amount of plaintiff's demand based upon her expectance of life. It was the intention of the parties, as evidenced by the policy, to pay only at the time and in the manner specified in the policy."

NORTH CAROLINA: Green v. Inter-Ocean Casualty Co., 167 S. E. 38; Rayburn v. Casualty Co., 54 S. E. 283.

TENNESSEE: Atkinson v. R. R. Employees Mutual Relief Society, 22 S. W. 631.

TEXAS: New York Life Ins. Co. v. English, 72 S. W. 58; State Life Ins. Co. v. Atkins, 9 S. W. (2) 290.

The American Law Institute, Restatement of the Law of Contracts, paragraph 318, announces the following rule:

> "318. Anticipatory Repudiation as a Total Breach.
>
> "Except in the cases of a contract originally unilateral, and not conditional on some future performance by the promisee, and of a contract originally bilateral that has become unilateral and similarly unconditional by full performance by one party, any of the following facts, done without justification by a promisor in a contract before he has committed a breach under the rules stated in Section 314-315, constitutes an anticipatory repudiation which is a total breach of contract:
>
> "(a) A positive statement to the promisee or other person having a right under the contract, indicating that the promisor will not or can not substantially perform his contractual duties."

The same rule is announced in Williston on Contracts, Vol. III, Section 1329, page 2382; Page on Contracts, Vol. V. Section 2891, page 5107.

POINT IV.

SUMMARY

We respectfully submit that the petition for writ of certiorari should be denied in this case:

(a) The doctrine of anticipatory breach is of limited application, and has usually been confined to breach of contracts to manufacture and sell commodities, contracts

of marriage and contracts of personal service. The doctrine has no application to definite and fixed sums of money payable at stated periods of time.

(b) If the doctrine of anticipatory breach shall be held to apply to life insurance contracts, liability thereupon should be predicated upon fixed and well-recognized legal principles. There must be a total, unconditional, unambiguous repudiation of the entire contract while the contract is executory upon both sides. In the instant case, the contract was totally executed so far as the petitioner is concerned. The petitioner might have sued at any time since February 13, 1933, for monthly disability payments. The contract was fully executed upon the part of the petitioner. Neither was there any repudiation of the policies upon the part of the respondent. The respondent merely took the position that the petitioner was not totally and permanently disabled within the meaning of the policy; that the petitioner was still doing some work without injury to himself, notwithstanding his disability. The respondent recognized the validity and the binding effect of the outstanding policy. The respondent did not deny that the policies were in existence. The respondent merely took the position that the time had not arrived when the petitioner was entitled to collect monthly disability payments or to have waiver of premiums thereupon. The respondent never denied liability to the petitioner, if in fact the petitioner was totally and permanently disabled.

Petitioner's counsel call attention to the fact that as to policy 10,840,538, on March 1, 1933, respondent took the position that the petitioner was not continuously totally disabled, and that the premium falling due February 7,

1933, should be paid, (R. 159); and upon April 13, 1933, the premium not having been paid, advised the petitioner to become reinstated for which purpose a blank was inclosed him, (R. 163); and upon June 5, 1933, there having been no application for reinstatement, petitioner was advised that the reserve in the policy had been applied to purchase continued insurance. (R. 164-165). As to policy 7,802,419, on June 9, 1933, notice of premium July 9, 1933, was sent to the petitioner, (R. 165). However, the thirty days of grace would carry the policy until August 9, 1933, on which date, upon reconsideration of the claim, premium receipts on each policy were issued, (R. 172). Respondent was not repudiating the petitioner's contracts of insurance by such action, but assuming as it did that the petitioner was not continuously disabled within the meaning of the policy, it was invoking the very terms of the policies themselves. Payment of the premiums was the essence of the policy. **Bergholm v. Peoria Life Ins. Co.**, 76 L. Ed. 416, 284 U. S. 489.

There was no statute in Mississippi requiring nor did the policy require, that any written notice be given the petitioner thereof. The respondent was merely calling the petitioner's attention to the consequences which would follow nonpayment of premiums, assuming that he did not continue totally disabled, and assuming as it did that he was not totally and permanently disabled within the meaning of the policy. The respondent was reaffirming, rather than repudiating, the policy.

The respondent is a mutual company, and the policies were participating policies, with very valuable rights.

Policy 10,340,538 was automatically carried, by reason of its reserve, to June 20, 1937, without the payment of any premiums, (R. 164); this period may be beyond the life of the insured, but certainly, the respondent was not repudiating the contract. That question was presented in the case of **Kimel v. Missouri State Life Ins. Co.**, 71 Fed. (2) 923. In that case, the insurer in violation of its contract with the assured, refused to waive the payment of premium, but made an endorsement upon the policy, charging the premium to the policy, with interest thereupon. The court, in passing upon the question, used the following language:

> "An offer to perform in accordance with the promisor's interpretation of the contract, although erroneous, if made in good faith, is not such a clear and unequivocal refusal to perform as amounts to a renunciation giving rise to an anticipatory breach.
>
> "As stated in Armstrong v. Ross, 61 W. Va. 38, 55, S. E. 895, 899: 'If this were not the law, it would be a dangerous thing to stand upon a controverted construction of a contract. Every man would act at his peril in such cases, and be subjected to the alternative of acquiescing in the interpretation adopted by his opponent, or putting to hazard his entire interest in the contract. The courts have never imposed terms so harsh or burdens of such weight. It would amount to a virtual denial of the right to insist upon an honest, but erroneous, interpretation."

For, as here, the assured was demanding of the company more than he was entitled to. As early as March 9, 1933, (R. 160-161), petitioner's council demanded $28,980.00

from the respondent. The respondent had done nothing but indicate that the assured was not totally and permanently disabled, and that the premium maturing on Policy 10,340,538 February 7, 1933, which should be paid by the 7th of March, 1933, was due. At that time, the premium under Policy 7,802,419 was paid up to July 7, 1933, and the premium was not requested until June 7, 1933, (R. 164). The utmost that may be said about the situation is that the parties differed about their legal rights. The petitioner expressly admitted, of record, that the respondent was not guilty of any bad faith, (R. 186-187). The respondent offered to prove by Frank S. Lantry, Chairman of Disability Claims Committee, that the company had to be very careful in respect to these claims, in that such claims present a wide opportunity for fictitious claims. The respondent offered to prove such fact in order to deny any imputation of bad faith. Petitioner's counsel admitted, of record, that the question of good faith was not involved; it was simply a question of breach of contract. (R. 187).

In the instant case, the Circuit Court of Appeals said that the respondent was not repudiating its contract. Upon the other hand, it was invoking the express terms thereof. The court used the following language:

> "And for another reason, there could here be no recovery. In order to constitute an anticipatory breach of the entire contract, there must be a clear and unequivocal repudiation by the promisor of all that remains to be performed, a refusal to be further bound by the contract. Dingley v. Oler, 117 U. S. 496; Roehm v. Horst, 178 U. S. 1; Kimel v. Missouri State Life Ins. Co., 71 Fed.

(2) 921, and cases cited. A reading of the correspondence above set out disclose that at no time did the Insurance Company renounce or repudiate its policies, but founded everything it did upon the terms of them. Even its declaration of lapse and invitation to reinstatement were no repudiation, but in pursuance of their express provisions. All that happened was that the company misjudged its obligations. Such an error made in good faith, whether founded in mistake of law or fact, is not repudiation, and does not end a continuing contract, but calls only for its enforcement according to its terms. Mutual Life Ins. Co. v. March, 56 S. W. (2) 433; Massachusetts Protective Ass'n. v. Jurney, 68 S. W. (2) 455. In this case, the company acknowledged its error and tendered full compensation, together with costs. The insured had no right to anything more."

Dealing with the same argument, Judge Denison, in the dissenting opinion in the Rascoe case, used the following language:

"Such a repudiation can not be found in the final cancellation made by the insurance company; that cancellation was an act in express pursuance of the contract, and not in repudiation of it; it was a termination of future liability, and not at all a repudiation of any accrued and existing obligation. Nor can it be found, as I think, in the refusal to pay. What defendant really did was to deny that there was any breach which had obligated it

to pay or which obligated it to pay any more. Defendant never has questioned the entire validity of the contract, or denied its continuing liability to pay anything which, under the contract, it ought to pay. While there are decisions which find the necessary basis in a mere denial or breach, I doubt whether they give due regard to what ought to be the character of a repudiation effective to create an obligation inconsistent with the express terms of the contract. In my judgment, this case illustrates the evil of laxity in permitting a premature recovery. In such a case as this (as facts often are, though possibly not in this case), plaintiff in a year or two may recover entirely, or (if the case is as bad as here claimed) is very likely not to live long. In either case, the true liability is for a short term; but the recovery has been upon the basis of the full expectation of life of a healthy person,—though no error in this respect was duly saved."

(c) The decision in the instant case does not conflict with, and is not contrary to the rule announced in any opinion of this court, as will appear from the foregoing argument.

(d) The opinion in the instant case is not contrary to the decision of the Eighth Circuit in the Rascoe case within the meaning of Rule 38 of this court governing the granting of writs of certiorari, for that:

(a) There was no finding of facts by the District Judge, and the record presents no case wherein it was appropriate for the court to announce a rule of law dealing with the question, and the opinion is purely obiter dictum.

(b) The majority opinion held that there was a complete repudiation of the entire contract while the same was still executory on both sides.

(c) The dissenting opinion of Judge Denison is so apparently a correct statement of the rule, and has been cited with approval with such practical unanimity as to destroy the effect of the majority opinion, so that the same is no longer a judicial precedent within the meaning of Rule 38 of this court.

(d) The opinion in the Rascoe case has been, with absolute uniformity, rejected by every court where the same has been brought under review.

(e) The opinion in the Rascoe case is in conflict with and contrary to all the opinions on the subject by this court.

(f) The opinion in the Rascoe case is contrary to the law in the State of Mississippi, where the contract was made. The Supreme Court of Mississippi has repudiated the majority opinion, and adopted Judge Denison's dissenting opinion.

(g) The majority opinion in the Rascoe case is opposed to the great weight of authority in this country dealing with the identical question, and is contrary to the announcement contained in the American Law Institute Restatement of the Law of Contracts upon the question of anticipatory breach.

We respectfully submit that the question of the granting of the writ of certiorari by this court is discretionary, and by reason of the things herein stated and the authorities cited, this record presents no appropriate occasion for the exercise by this court of such right. We submit that the petition should be denied.

Respectfully submitted,

LOUIS H. COOKE,

WILLIAM H. WATKINS,

P. H. EAGER, JR.,

Counsel for Respondent.